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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 595 .

ESTATE OF ANNIE PRESTON BASSETT,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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THE COURT PRESS, N. Y. C.

INDEX.

TABLE OF CASES CITED:

STATUTES CITED:

REGULATIONS CITED:

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No. .

ESTATE OF ANNIE PRESTON BASSETT,
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COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition of Preston R. Bassett, as Executor of the Estate of Annie Preston Bassett, deceased, respectfully prays for a writ of certiorari to the United States Court of Appeals for the Second Circuit to review a judgment of that court entered in this case on November 29, 1948; and therefore shows as follows:

I.

A SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED.

This action involves the estate tax liability against the foregoing estate. The United States Court of

Appeals for the Second Circuit affirmed (R. p. 164) a decision, favorable to the respondent in The Tax Court of the United States (R. p. 27).

Preston R. Bassett as successor executor of the estate of Annie Preston Bassett, deceased, has been substituted as petitioner herein, in the place and stead of Edward M. Bassett, Executor, deceased, by order of The Tax Court of the United States, dated January 26, 1949, Docket Number 9639, and the caption of this proceeding has been changed accordingly.

The decedent, Annie P. Bassett, died at Brooklyn, N. Y., at the age of 76 years, on January 22, 1942. She was survived by her husband, her five children and her fifteen grandchildren.

The decedent and her husband had practiced in their lives a financial partnership in the division of their property and in together making gifts to their children. Her husband began making gifts to her soon after their marriage in 1890 and continued the plan throughout their lives at a rate sufficient to keep her estate about equal to his in size (R. p. 155).

In 1920 husband and wife began a plan of making liberal gifts to their children. In two years the husband made eleven gifts totaling $68,750.00. In the following two years the decedent made eight gifts totaling $50,000.00. One hundred and eight gifts having a total value of $330,000.00 were made by them between 1920 and 1940, during which twenty year period only six years passed without some gift being made to one or another of their children (R. pp. 28, 149-153).

After the adoption of the Gift Tax Law in 1932, the gifts they made were all within the annual exclusion limits of $5,000.00 and later $4,000.00 to any one person. The last of the gifts made before the

period in question were made in March, 1940, by both husband and wife simultaneously. The gift making program had not been uniform but had been fairly constant. The fluctuations were the normal result of changing business conditions and the variations in the needs and circumstances of their children (R. pp. 28, 149).

Beginning in 1941, the period in question, the program of these gift-making parents was increased to the extent that was permissable to them for making simultaneous gifts within the non-taxable range of the gift tax law. Gifts were made by both parents to all their children and their families to take advantage of the lifetime exemptions of $40,000.00 allowed to each donor, as well as some twenty gifts under the annual exclusions.

Their combined estates, amounting to about $600,000.00 at this time, was invested in several hundred small mortgages being serviced by her husband. The responsibilities attendant upon this work had become a considerable burden to him. His eyesight began to fail at this time, requiring that he surrender his office work. It was a tragic and dramatic event for him to be gradually and relentlessly shut off from the world. The partners, husband and wife, felt that it was imperative for the sake of his health to take another step in their lifelong plan of gift-making in order to relieve him as far as possible from the worries which were seriously interfering with his sleep (R. p. 98).

Their gift program for this reason was stepped up during 1941 and within a year the husband's condition required three eye operations and the dissolution of his law firm (R. p. 99).

Another compelling reason for the filling out of their gift program was the financial needs of their daughter Marion. She lived with her husband and two sons in suburban New Jersey but was having marital trouble, and on the verge of breaking up her family. Early in 1941 Marion's affairs reached a climax. She took steps to leave her husband who could no longer provide for her and was himself in debt. She moved to a small apartment in New York City and began divorce proceedings. Her parents were anxious to help her to the limit financially and numerous gifts of 1941 were the natural consequence (R. pp. 96, 97, 99).

During this period the decedent was occupied with many and varied social and religious activities in her community. In November alone, she had two large club meetings at her home and entertained a large family gathering at Thanksgiving time. She also had two winter coats repaired and made other plans for the future (R. pp. 136, 137).

According to the husband, the survivor of this gift-making partnership, the foregoing facts were the only facts which actuated him and his wife in their planning and giving. The only motives for their gifts were the motives which he and his wife shared together, which were supported by the surrounding circumstances regarding their children,—their own diminishing needs, —and their desire to enjoy together the comfort and ease which busy lives had earned for them (R. pp. 101, 137).

From January to December, 1941 they reduced their estates from a combined $600,000.00 to a combined

$300,000.00 by simultaneous gifts to their children as follows (R. pp. 129, 153):

January,		1941,	five	gifts	by	husband	$ 4,000	each	$ 20,000
"		"	"	"	"	wife	"	"	20,000
June	21,	"	"	"	"	husband	12,000	"	60,000
"	"	"	"	"	"	wife	"	"	60,000
October	1,	"	fifteen	"	"	husband	4,000	"	60,000
"	"	"	"	"	"	wife	"	"	60,000
November	1,	"	five	"	"	husband	"	"	20,000
"	"	"	"	"	"	wife	"	"	20,000
							Total		$320,000

The foregoing gifts by the wife are in issue on the grounds that they were made in contemplation of death (R. p. 22). She came down with a cold which developed into pneumonia in December 1941. The family doctor concluded that she had a cancer of the lung but the decedent was never told what her real condition was (R. p. 30). Nothing in her conduct or conversation with those in daily contact with her ever indicated that she suspected that she might have something seriously wrong (R. pp. 101, 137).

Recovering from the pneumonia in January, 1942 she was feeling much better. She then made eight more gifts under the new annual exclusions. Shortly afterward her condition grew worse and she died January 22, 1942. Her husband made twenty-five additional gifts during 1942 bringing the total value to about $100,000.00 for their gifts for that year. Her estate amounted to about $85,000.00 at her death and an estate tax of $2,068.39 was paid (R. p. 23).

Her husband as executor reported all the small gifts she had made under Schedule G. of her estate tax return. The Commissioner of Internal Revenue assessed a deficiency tax of $61,204.30 against the estate, September 7, 1945, on the ground that the

transfers made within two years of death were made in contemplation of death (R. p. 22).

A timely appeal for a redetermination was made (R. p. 3) and a decision of The Tax Court of the United States was rendered in which the early gifts of March 1940 were upheld without comment but the gifts of January 1941 and following were held taxable. The court made no mention of the concurrent nature of the gifts (R. pp. 27-40).

Upon appeal the United States Court of Appeals for the Second Circuit affirmed the Tax Court decision by invoking the statutory presumption on the ground that "the gifts aggregated" a "material part" of decedent's estate even though individually "none of the separate gifts in this case was a 'material part' ".

II.

A STATEMENT PARTICULARLY DISCLOSING THE BASIS UPON WHICH IT IS CONTENDED THAT THE SUPREME COURT OF THE UNITED STATES HAS JURISDICTION TO REVIEW THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

(a) The statutory provision believed to sustain the jurisdiction of the Supreme Court of the United States.

The Supreme Court of the United States has jurisdiction to review the judgment of the United States Court of Appeals by reason of the provisions of Section 1254 of Title 28 of the United States Code (Public Law 773—80th Congress, Chapter 646, 2d Session).

(b) The date of the judgment sought to be reviewed and the date upon which the petition for a writ of certiorari is presented.

(1) The date of the judgment sought to be reviewed is November 29, 1948 (R. p. 164).

(2) The date upon which the petition for a writ of certiorari is presented is February 25, 1949.

III.

THE QUESTION PRESENTED.

The question presented is as follows:

Are the following gifts made by the donor includable in the gross estate as transfers made in contemplation of death within the meaning of Section 811 (c) of the Internal Revenue Code:

January	25, 1941—	5	gifts—total	$ 20,000.00
June	21, 1941—	5	" — "	60,000.00
October	1, 1941—	15	" — "	60,000.00
November	1, 1941—	5	" — "	20,000.00
January	12, 1942—	8	" — "	32,000.00
				$192,000.00

IV.

THE REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

1.) The United States Court of Appeals for the Second Circuit has held in this case, that the statutory presumption, which applies to "any transfer of a

material part", also applies to gifts, which may aggregate a material part, although by the Circuit Court's own statement, "none of the separate gifts in this case was a material part of the decedent's property."

This is a momentous decision for the respondent, Commissioner of Internal Revenue, as well as for the petitioner, because respondent's auditors in reviewing estate tax returns since the adoption of the Act in 1916 have consistently disregarded as not in contemplation of death all gifts of less than $5,000.00 solely because of size. In view of this long established practice the respondent should desire as well as the petitioner a ruling by this court on the matter.

The necessary effect of this decision is to decide an important question of federal law which has not been, but should be, settled by the Supreme Court of the United States.

2.) The United States Court of Appeals for the Second Circuit, by affirming the decision of The Tax Court of the United States, herein has sanctioned a clear departure from the accepted and usual course of judicial procedure for this reason; the Tax Court plainly disregarded the best evidence of the decedent's motives by failing to take cognizance of the surviving gift-making partner's motives, as shown by his sworn testimony, and by substituting in the place of such evidence mere conjecture or surmise.

The ascertained and proven facts relating to her state of mind and the reasons actuating her and her husband in their joint gift making, supported by evidence of a need for gift making at that time should not be set aside without comment in favor of a supposition entirely unsupported by the evidence.

WHEREFORE, your petitioner respectfully prays that Writ of Certiorari be issued out of and under the eal of this honorable Court directed to the United States Court of Appeals for the Second Circuit, commanding that court to certify and send to this Court or its review and determination, on a day certain o be therein named, a full and complete transcript f the record and all proceedings in this cause to the nd that the said cause may be reviewed and determined by this Court according to law; and that your petitioner may have such other and further relief as o this Court may seem proper and in conformity with law.

And your petitioner will ever pray.

CHAUNCEY P. CARTER,
Counsel for Petitioner.

PREW SAVOY
HOWARD M. BASSETT,
Of Counsel.

Dated—Feb. 25th, 1949.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. .

ESTATE OF ANNIE PRESTON BASSETT,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinions of the Courts Below.

The opinion of the United States Court of Appeals for the Second Circuit is reported in 170 F. (2d) 916 (see pp. 164-167 of the Record). The opinion of The Tax Court of the United States is a memorandum decision reported in 6 T. C. M. 887 (see pp. 27-40 of the Record).

Jurisdiction.

The grounds on which the jurisdiction of the Supreme Court of the United States is invoked are set forth beginning at page 6 herein, in the petition for writ of certiorari.

Statement of the Case.

The facts are as set forth, beginning at page 1 herein, in the petition for writ of certiorari.

Specification of Errors.

1. The United States Court of Appeals for the Second Circuit erred in finding and holding that the gifts totaling $192,000.00 made by the donor during 1941 and 1942 constituted part of the gross estate of the decedent herein.

2. The United States Court of Appeals for the Second Circuit erred in failing to find and hold that some or all of the five groups of gifts made by the decedent were natural *inter vivos* gifts made for purposes associated with life and without any thought or contemplation of death within the meaning of Section 811 (c) of the Internal Revenue Code.

3. The United States Court of Appeals for the Second Circuit erred in affirming the decision of The Tax Court of the United States.

4. The United States Court of Appeals for the Second Circuit erred in entering judgment for the respondent.

Summary of Argument.

1.) The statutory presumption created by Section 811 (c) of the Internal Revenue Code applies to "Any transfer" if it is a material part of the decedent's property made within two years of his death, but it has never been held to apply to the

"aggregate" of transfers no one of which is a material part.

The invocation of this presumption by the United States Court of Appeals for the Second Circuit herein, is clearly erroneous, not only as a misinterpretation of the Act, but as counter to the intention of the Act, which is to exclude minor gifts as expressed in the gift tax statute, and minor transfers made during the decedent's lifetime, as expressed in the estate tax statute. The interpretation is also counter to the express regulations of the Treasury Department and the practice of the Bureau of Internal Revenue which have uniformly and explicitly held that transfers of less than $5,000.00 made by the decedent during his lifetime should not be reported by his executor and should not be taken into account by the department auditors in determining the decedent's taxable estate.

It is also counter to everyday experience that elderly people of means customarily make gifts to relatives, the aggregate of which, over a two year period might constitute a material part, without in any way indicating that contemplation of death was the motive. The fact that there are no cases on the subject is in itself significant. The Tax Court has failed to consider the matter in the only opportunity it has had to our knowledge.

2.) The decision of The Tax Court of the United States herein has been based upon the premise that the deceased donor was acting independently and alone in making her gifts during 1941 and 1942 herein, and not in conjunction with a surviving gift-making partner. The testimony that she was acting jointly with her husband and making gifts concurrently with

him has not only been disregarded but it has not even been referred to in the Tax Court opinion as one of the pertinent facts in the case.

The United States Court of Appeals for the Second Circuit has affirmed this decision and tacitly sanctioned this improper procedure based as it is upon a false and untenable premise. The best evidence of the deceased donor's motives is the testimony of her gift-making partner in regard to their innumerable conversations, the understandings and objectives sought to be obtained, and the supporting circumstances which were deemed important to them in prompting the actions that they were jointly taking.

The Tax Court decision is based upon a conjecture that the deceased donor had figured out for herself that she did not have long to live although she had no information on which to base her conclusion. As a result it held that the dominant motive in her case was contemplation of death. This speculation falls short of proof and cannot stand against the ascertained and proven facts relating to her actual conversations, actual expressed concerns and motives and the undisputed and innumerable supporting facts and circumstances surrounding herself and her family, as well as the long continued practice of making liberal gifts to her children in conjunction with her husband.

ARGUMENT.

I.

The statutory presumption does not apply to gifts of less than $5,000 even if they aggregate a material part.

The Commissioner makes his assessments under Section 811 of the Internal Revenue Code, which provides for the taxation of gifts made in contemplation of death. This section reads as follows:

> "Code. Section 811. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, * * *
>
> (c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of * * * his death, * * *"

As an aid in the collection of this tax the Congress has given the Treasury the benefit of a statutory presumption which is a part of the same section and reads as follows:

> "Any transfer of a material part of his (decedent's) property in the nature of a final disposition or distribution thereof made by the decedent within two years prior to his death * * * shall, unless shown to the contrary, be deemed to have been made in contemplation of death."

The United States Court of Appeals for the Second Circuit invoked the statutory presumption in this case on the following grounds:

> "While it may be that none of the separate gifts in this case was a 'material part' of the decedent's property, yet, as the gifts aggregated over half of her estate, the statutory presumption applies."

By definition, a transfer is an act by which the property of one person is conveyed or vested in another person. If the instrument of conveyance has two or more grantors, or two or more grantees, it may still be called a transfer by using the word as synonymous with the instrument of transfer. If, however, the acts of the grantor consist of drawing checks, and mortgage assignments, and the delivery of bonds to various persons, as happened in the gifts involved in this case, there was not one transfer, but a series of transfers.

By definition "a material part" means a substantial or considerable part, in contrast to a minor or inconsiderable part. Both the Estate Tax Law and the Gift Tax Law have established reasonable limits for minor or inconsiderable gifts, which should be considered in determining, at least the minimum, of what may be deemed a "material part". This minimum under the Gift Tax Law was $5,000.00 under the Act of 1932, and was reduced to $4,000.00 by the 1938 Act, and $3,000.00 by the 1942 Act.

The Estate Tax Law (Revenue Act of 1926) contained the following sentence in Section 302 (c) expressly limiting the tax liability in contemplation of death gifts to the excess over $5,000.00, as follows:

Section 302 (c)—"Where within two years

prior to his death he has made a transfer or transfers * * * and the value or aggregate value to any one person is over $5,000.00 then to the extent of such excess such transfer or transfers shall be deemed to have been made in contemplation of death."

This provision not only set a minimum limit to the statutory presumption, but it also excluded the first $5,000.00 of any transfer, even though it was in fact, made in contemplation of death and taxable. For the latter reason the provision was omitted in later revisions of this section but the minimum limit on the statutory presumption continues in practice and is embodied in the Treasury Regulations accompanying this section as follows:

8/.15

Regulation 105—*Article ~~17~~—Transfers during life*:

5th paragraph—"All transfers made by the decedent during his life of an amount of $5,000.00 or more, * * * must be disclosed in the return, whether the executor regards such transfers as subject to the tax or not."

8/.16

Art. ~~16~~ *Transfers in contemplation of death*:

5th paragraph—"If the executor contends that the value of a transfer of $5,000.00 or more made by the decedent * * * should not be included in the gross estate because he considers that such transfer was not made in contemplation of death, he should file * * * etc."

The legal effect of the foregoing is perfectly clear. It is that the executor under no circumstances is required to report in the return any transfer made

by the decedent of less than $5,000.00, and if any transfer of less than $5,000.00 was made in contemplation of death, it nevertheless, need not be reported in the return.

The Revenue Act deliberately recognizes that gifts of minor importance must be excluded from the point of view both of convenience and purposes in view. It is a recognition that wedding gifts and Christmas presents do not come within the purview of the Revenue Act, and also, that annual sums of minor amounts are customarily given by parents of means to meet living expenses and ordinary needs of children with growing families and grandchildren.

In *Estate of Fletcher E. Awrey,* 5 T. C. 222, the decedent made sixteen gifts of about $5,000.00 each within two years of his death, totaling $80,900.00, being about one-half of his estate. Neither the Commissioner nor the Tax Court attempted to invoke the statutory presumption although the gifts obviously aggregated a material part of decedent's estate.

In *Estate of George H. Kent,* 6 T. C. M. 933, the decedent made two gifts of $4,000.00 and two of $3,500.00 each within two years of his death, but no attempt was made to invoke the statutory presumption.

II.

The surviving husband's testimony is the best evidence of his deceased partner's motives against which mere conjecture cannot stand.

The issue in contemplation of death cases is essentially one of fact. But the test is always to be found in motive. We are required to look into the state of mind of a woman now dead in order to find her motive when she made the particular transfers of property. The decedent is, of course, unavailable to testify. Accordingly, recourse must be had to every variety of circumstantial evidence available.

The Tax Court proceeded to investigate what the decedent might have concluded from the fact that she had had some X-ray treatments of her chest in June, 1941; that she had a breast removed in 1938, after which she also had some X-ray treatments, and from the fact that she had a chronic bronchitis. This enquiry into apparently remote circumstances was conducted to ferret out the decedent's motivation for her gifts and from these facts the Court concluded that the dominant motive for making the transfers was contemplation of death.

The testimony of the donor's sister, Miss Belle Preston, shows that she herself had had a breast removed because of a tumor in it some twenty years previously without any ill effects. Miss Preston testified that the decedent spoke freely and frequently of her own similar operation to her intimate friends with complete self assurance that the matter was of no consequence (R. p. 135). The Court made no reference to this testimony.

The decedent had a mild but chronic bronchitis for many years before her death which had no connection

with cancer. Her sister testified that decedent took these X-ray treatments to relieve her bronchitis (R. p. 142), and the family doctor testified that the effect was to relieve her bronchitis (R. pp. 81, 83).

The Tax Court's enquiry at best was inconclusive since there was no evidence that decedent was concerned about her health and it is entirely believable that her thoughts on the subject of her health were the same as her husband's and her sister's. The court made no reference to this testimony.

Since the decedent is unavailable to testify, we must have reference to the particular facts which would most likely be relevant in her mind. The testimony shows conclusively that a financial partnership existed between husband and wife and that joint action was taken by them in making the exact gifts here in issue pursuant to a common plan. The Tax Court has made no reference to this testimony.

It must be assumed that the motives of a husband and wife who had previously acted in accord on all financial matters would be identical in making simultaneous gifts to the same persons. The husband's testimony proved that their motives were associated with life and not with death. The Commissioner offered no evidence to contradict that of the husband and, therefore, it must stand as given.

In such case the husband's motives must be considered as evidence of the wife's motives and should prevail over guess work to determine the decedent's motives as was done by the Tax Court.

There was no occasion for the wife to consider her property as a separate entity from her husband's or to concern herself about the legal and taxation problems perplexing most people of her financial means. There is no evidence that she did concern herself about such matters.

The Tax Court cited two cases in support of the proposition that gifts may themselves speak so eloquently of testamentary disposition that contrary evidence would be superfluous.

In *Land Title & Trust Company* v. *McCaughn,* 79 Fed. Sup. 602, the donor made a single trust of his entire estate leaving himself without income or property. In the other case, *Farmers Loan and Trust Company* v. *Bowers,* 68 Fed. (2d) 916, the donor, William Waldorf Astor, made a transfer in trust to persons of such wealth in their own right as to raise the question whether any purpose associated with life was served.

In the present case the donor's transfers were not without explanation. The volume of her gifts was no greater than the volume of her husband's gifts. Her estate was as large as his before the transfers took place and equal to his after their gift plans were completed.

The daughter Marion and her boys were apparently in greater financial need than any of her children had been when she made them gifts twenty years earlier.

The reduction in income tax liability was about one thousand dollars to each gift-making partner, and the freedom from business worries and responsibilities upon the husband was a considerable factor in the minds of each.

The pattern that was followed had been established by both as to their five children and twice during the previous five years as to the fifteen grandchildren by the husband partner.

The conversations between husband and wife have not been reported in detail but that there were many such conversations is obvious from the testimony of the husband and from the general implication that every

husband and wife have many occasions and many inducements to talk things over together and make plans for their future as well as in the carrying out of those plans. Could the witness have repeated such conversations in detail for the record it would have made a voluminous but vivid portrayal of decedent's true state of mind so convincing that any such enquiry as pursued by the Tax Court would have been a plain departure from the known facts. These gifts were planned in each case to meet the urgent needs of existing and troublesome situations.

The presumption created by the statute or the supposition arrived at by the Tax Court that the transfers in question were made in contemplation of death are clearly out of order and cannot stand against the ascertained and proven facts showing the contrary to be true.

The best evidence of the decedent's state of mind at the times she made the gifts are her conversations with her husband who was making simultaneous gifts. The best evidence of her motives are the statements of her gift-making partner supported as they are by the compelling circumstances affecting their own and their children's happiness and well being.

CONCLUSION.

It is, therefore, respectfully submitted that the petition for writ of certiorari should be granted as prayed for.

Respectfully submitted,

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